



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

MISC. NO. 230 OF 2015

PANGAEA DEVELOPMENT HOLDING LIMITED.....CLAIMANT

VS

HACIENDA DEVELOPMENT LIMITED.....1ST RESPONDENT

ADAM TULLER.....2ND RESPONDENT

RULING

1. The Parties herein referred their Dispute to the Arbitration of Njoroge Regeru as the sole Arbitrator. And he returned an Award.
2. In an Application dated 4th July, 2017, Pangaea Development Holdings Limited (**the Claimant**) sought leave of Court, under the Provisions of Section 36 of The Arbitration Act, to enforce as a decree of this Court the Arbitrator's final Award dated 30th September 2016.
3. Hacienda Development Limited and Adam Tuller (**the Respondents**) were not to be left behind and on 30th August, 2017 moved the Court with a multiplicity of requests as hereunder:-
 - a. spent
 - b. The declarations, findings and holdings in paragraph 12.6 of the final award by Njoroge Regeru FCI Arb, Arbitrator dated 30.9.2016 be affirmed and recognized.
 - c. The declarations findings and holdings in paragraphs 11.1, 11.2, 11.3, 11.4, 11.5, 11.6, 22.1, 12.3, 12.4 and 12.5 of the final award by Njoroge Regeru FCI Arb, Arbitrator dated 30.9.2016 be set aside and declared null and void.
 - d. The final award by Njoroge Regeru FCI Arb, Arbitrator dated 30.9.2016 and contained in paragraphs 10,11.4, 11.6, 12.5 and 12.7 be set aside, varied and be substituted with the following declarations, holdings, findings and orders:-
 - i. The costs of the reference and the award payable and paid to the Arbitrator be declared to have been payable by the Claimant and all costs, charges and fees of the Arbitrator and the Stenographers already paid by the Respondents be refunded by the Claimant to the Respondents.
 - ii. The Claimant to pay the Respondents' costs of the reference and the award including legal costs, attendances, travel, sustenance and accommodation expenses of the Respondents, their witnesses and their Advocate and for that purpose upon the determination of this application this Court be pleased to permit the Respondents to file a fully itemized Bill of Costs for taxation by the Deputy Registrar of this Court.
 - iii. The Claim concerning the transfer of the subject land parcel from Hacienda Development Holdings Limited to the 1st Respondent is dismissed with costs.
 - e. This Court be pleased to direct the removal of any caveat registered at the behest of the Claimant against Plot Number LR NO.MN/11/10279.
 - f. This Court be pleased to dismiss Nairobi HCCC NO.800 of 2009 (Pangaea Development Holdings Limited vs. Hacienda Development Limited, Adam Tuller, Richard Redmore & David Muniu) and for this purpose the Deputy Registrar of this Court do avail the Court file in that suit.

g. The costs of this application be paid by the Claimant to the Respondents in any event.

The Application was said to be brought under a raft of Provisions of Statute and the Constitution. But under the Arbitration Act, Sections 19, 29(4) & 29(5), 32(5), 32(b)(4), 35(2)(a)(ii), 35(2)(a)(vi), 35(2)(b)(vi), 35(2)(b) and (3), 37(1)(a)(iv) & (vii) & (b) and Rules 3(2), 4(2), 7 and 8 of The Arbitration Rules were cited.

4. Although, the two Applications were to be argued together, the Claimant's Counsel requested that the Claimant's Application for enforcement (that of 4th July 2017) do pend an application for correction of an error in the Award. The error in award 1.2.2 was pointed out by Mr. Kinyua Kamundi appearing for the Respondents. Correction of computation errors, any clerical or typographical errors or any other errors of a similar nature in an Arbitral Award can be sought under Section 34 of The Arbitration Act. But as the Provision is time bound, the Claimant may have to contend with the timelines imposed thereunder. But that is an issue for another day.

5. The Application now before Court is the Chamber summons of 28th August 2017. Of the Prayers therein prayer (b) is not controversial and is not opposed by the Claimant. It seeks that the declaration, findings and holdings in paragraph 12.6 of the final Award be affirmed and recognized.

6. Prayers (c) and (d) requests the setting aside of certain findings of the Award. In respect to the latter the further request is that upon the setting aside, the orders be varied and substituted in the manner proposed in the main body of the Chamber Summons. However couched these prayers are brought under the provisions of Section 35 of The Arbitration Act which provides:-

(1) Recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under subsections (2) and (3).

An arbitral award may be set aside by the High Court only if—

the party making the application furnishes proof—

(i) that a party to the arbitration agreement was under some incapacity; or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, the laws of Kenya; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(2) (a) (iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decisions on matters referred to arbitration can be separated from those not so referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless that agreement was in conflict with a provision of this Act from which the parties cannot derogate; or failing such agreement, was not in accordance with this Act; or

(vi) the making of the award was induced or affected by fraud, bribery, undue influence or corruption;

the High Court finds that—

(b) (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or

(ii) the award is in conflict with the public policy of Kenya

(3) An application for setting aside the arbitral award may not be made after 3 months have elapsed from the date on which the party making that application had received the arbitral award, or if a request had been made under [section 34](#) from

(4) The High Court, when required to set aside an arbitral award, may, where appropriate and if so requested by a party suspend the proceedings to set aside the arbitral award for such period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of the arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

7. It is common ground and expressly admitted by the Respondents that they received the final Award on 8th May, 2017. Under the provisions of Section 35(3), the Application for setting aside ought to have been brought not later than 3 months from the date when the Party making the Application received the Award.

8. Under The Interpretation and General Provisions Act, (Chapter 2 Laws of Kenya) a month is defined as follows:-

“month” means calendar month.

9. The construction of a Calendar month was the subject of an interesting discussion in the Court of Appeal decision of Henry Mukhwana Kwemuli vs. Joseph Musungu Ngachi (1988) eKLR in which the following interpretation carried the day:-

“As the Interpretation and General Purposes Act (Cap. 2) provides for a calendar month which same provision has been made in England, the statement in *Halsbury’s Laws of England*, 3rd Ed. Vol. 37 page 83 may be said to conclude the argument –

“When the period described is a calendar month running from the period of any arbitrary date, the period expires with the day in the succeeding month immediately preceding the day corresponding to the date upon which the period starts; save that, if the period starts at the end of the calendar month which contains more days than the next succeeding month, the period expires at the end of the latter month.”

10. As the Arbitration Act does not provide the formula for computing time under the Act, computation of timelines set by the Act is provided by the provisions of Section 57 of The Interpretation and General Provisions Act. The Section reads:-

“57. In computing time for the purposes of a written law, unless the contrary intention appears-

a. a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happened or the act or thing is done.

b. if the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day.

c. where an act or proceeding is directed or allowed to be done or taken on a certain day, then, if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day.

d. where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time”.

11. Guided by the foregoing, the Respondents having received the Award on 8th May 2017 ought to have filed the Application for setting aside by 8th August 2017. This Application filed on 30th August 2017 is without a shadow of doubt out of time. A strict adherence to timelines in the Arbitral process enhances the virtue and principle of finality that is pivotal to Arbitration as a dispute adjudication mechanism.

12. There are two other limbs of the Summons which I now decide.

13. In Prayer e, this Court is asked to direct the removal of any Caveat registered at the behest of the Claimant against Plot number LR No.MN/11/10279. The justification for this Prayer is that the Claimant did not succeed on the Prayer for nullification of the transfer of the property and there can be no good reason to maintain the Caveat.

14. This Court however observes that in Award 12.5 the Arbitrator found as follows:-

“12.5 Prayer iv on the issue of the alleged fraudulent transfer of L.R Number MN/11/10279 remains undetermined as the same is not capable of adjudication or determination through this Arbitration”

In the body of the Award (page 55), the Arbitrator had observed,

“The upshot of the foregoing is that without HDHL and the other mentioned persons as parties to these proceedings, and they cannot possibly be parties as they are strangers to the Arbitration Agreement, I am unable to go further into the merits of the alleged transfer of the subject property and I would therefore leave the issue to the proper forum in the event the Claimant is minded to take that route”.

15. Emerging from these findings is that the issue of the transfer, though not reversed, is undetermined. It being so, the Respondents will have to resort to the Provisions of Section 73 of The Land Registration Act which provides the procedure for Removal of a Caution or Caveat. The removal of the Caveat may not be achievable through the Arbitral Award.

16. A High Court suit being Nairobi HCC No.800 of 2009, Pangaea Development Holdings Limited vs. Hacienda Development Limited, Adam Tuller, Richard Redmore & David Muniu was stayed pending the determination of the Arbitration herein. This Court is now asked to call in the file to those proceedings for purpose of dismissing it.

17. If it is true as suggested by the Respondents that the Arbitral Award resolved the issues in the suit, then the Respondent should simply move the Court in that suit for appropriate Orders. It does not help to muddle up issues by asking this Court to make Orders in proceedings that are not before it and have not been consolidated with this matter.

18. This is the fate of the Chamber Summons of 28th August 2017:-

18.1. Prayer (b) is allowed as prayed.

18.2 Prayer (c), (d), (e) and (f) are dismissed.

18.3 As the Summons has barely succeeded the Claimant shall have $\frac{3}{4}$ of the costs hereof.

Dated, Signed and Delivered in Court at Nairobi this 13th Day of April, 2018.

F. TUIYOTT

JUDGE

PRESENT:

Mumma h/b Odhiambo for Applicant

Kisinga h/b Kamundi for Respondent

Nixon – Court Assistant